A

MEL v LMK & Anor

B HIGH COURT (KUALA LUMPUR) — CIVIL CASE NO AA-22NCVC-92–11 OF 2020
SU TIANG JOO JC
25 JULY 2023

C *Trusts and Trustees — Trusts — Existence of — Resulting trust and constructive trust — Plaintiff commenced action as first defendant demanded her to vacate property which she was occupying with their children — First defendant purchased property and registered under second defendant's name — Whether there was constructive or resulting trust where first and/or second defendant were to hold half* D *share of property for plaintiff's benefit — Whether by acts of first and/or second defendant individually or jointly they had perpetrated breach of trust, fraud, cheating, unjust enrichment or tort of conversion against plaintiff*

E The plaintiff ('P') was the wife of the first defendant ('D1') while the second defendant ('D2') was the sister of D1. P and D1 were lawfully married on 14 February 2017. From their intimate relationship before the marriage, they were blessed with two children. In or about 2009, D1 purchased a property ('the property') and it was registered under the name of D2. P commenced this action as D1 was making demands for her to vacate the property which she was F occupying with their children. P asserted that: (a) the property was a matrimonial home, acquired during the marriage of she and D1; and (b) she had contributed towards the payment of the loan taken to purchase the property, purchased a bank draft and paid the redemption sum of RM154,757.84, expended a sum of RM94,541.64 towards the conveyancing G legal fees, painting and renovation works of the property, fitting it out with electrical appliances and furniture. Thus, the total amount spent came to RM249,299.48. P claimed that D1 and D2 had committed fraud and breach of trust causing her to be deprived of half undivided share in the property. The defendants asserted that: (i) the property was purchased and registered in the H name of D2 in 2009 upon the wishes of their late father; (ii) although a loan was taken under the name of D2, it was serviced by both D1 and his late father; and (iii) the property was to be transferred into the sole name of D1 who then settled the loan taken under the name of D2. D1 asserted that upon the death of their father and after D1 and P were lawfully married, P came to know that I he and his mother had inherited a substantial sum of money ('inherited money'). When D1 fell ill, P had kept him under the influence of psychotropic drugs making him feel dopey, convinced him that he was possessed and charmed by black magic, and P took the opportunity to transfer the inherited money to her own account without his knowledge or his consent. P then used

part of the inherited money to redeem the property. At no material time did he ever agree for the property to be a matrimonial property because it was the property of the defendants' family. D1 only regained his mental health after he was 'rescued' by his family members by taking him away from staying with P, and after he discontinued the taking the psychotropic drugs fed him by his wife earlier. The defendants counterclaimed against P for, inter alia: (A) a declaration that the property was not a matrimonial property; (B) P to move out from the property; (C) P to return the money; (D) general damages for breach of trust, cheating, fraud or tort of conversion; and (E) aggravated and exemplary damages.

Held, dismissing the claim:

(1) P had purchased the banker's cheque from the money she had transferred to herself from the accounts of D1 and that of D1's mother. The money utilised to effect payment of the redemption sum was not P's own money. It was D1 and his mother who were the provider of these funds. Therefore, P's claim grounded on the doctrine of presumption to have a resulting trust in her favour to the value of the redemption sum made by her, was without merit (see paras 41 & 50).

(2) The assertion by D1 that his monies were transferred from his account and that of his joint account with his mother during the period when he was under the influence of psychotropic drugs administered by P was credible. And that whilst under such influence, he was not in a position to give knowing consent. In the circumstances, D1 had not voluntarily given the money which was transferred by P to the three personal accounts under her sole name and by reason of which, D1 had also sufficiently rebutted the presumption of advancement (see paras 69–70).

(3) On the facts that it was found and in particular that the redemption sum paid by P was in fact D1's money, it followed that P's reliance upon the concept of constructive trust to claim for a share in the property was devoid of merit. With P having failed in her claim for a share in the property, it logically followed that D2 could stand on her being the registered proprietor of the property to seek vacant possession of the same and that no adverse inference was to be drawn against her for not coming forward as a witness. The assertion by P for the court to draw an adverse inference against D2 premised upon s 114(g) of the Evidence Act 1950 was misplaced and without merit. P's claim based upon fraud and breach of trust had also not been made out and was accordingly dismissed (see paras 73, 75 & 77–78).

(4) D1 had proved on a balance of probabilities that P had converted to herself D1's money held by him and that held together with his mother, and therefore as a joint account holder he was entitled to an account from P of the money she had fraudulently and tortiously converted to herself.

A Further, D1 had sufficiently rebutted that the money transferred to P's sole name was meant to be given to her and therefore a resulting trust of this money came into existence with P having to account to D1 for the same. However, D1's money that were expended by her for the benefit of such a purpose would attract the application of the doctrine of
B presumption (see paras 79–81).

[Bahasa Malaysia summary

Plaintif ('P') ialah isteri kepada defendan pertama ('D1') manakala defendan kedua ('D2') ialah kakak kepada D1. P dan D1 telah berkahwin secara sah pada
C 14 Februari 2017. Daripada hubungan intim sebelum berkahwin, mereka dikurniakan dua orang cahaya mata. Pada atau kira-kira 2009, D1 membeli hartanah ('hartanah') dan ia telah didaftarkan di bawah nama D2. P memulakan tindakan ini kerana D1 membuat tuntutan supaya dia mengosongkan hartanah yang dia duduki bersama anak-anak mereka.
D P menegaskan bahawa: (a) hartanah itu adalah rumah sepencarian, diperoleh semasa perkahwinan dia dan D1; dan (b) dia telah menyumbang kepada pembayaran pinjaman yang diambil untuk membeli hartanah itu, membeli draf bank dan membayar jumlah penebusan sebanyak RM154,757.84, membelanjakan sejumlah RM94,541.64 untuk bayaran guaman jual beli
E hartanah, mengecat dan kerja-kerja pengubahsuaian hartanah itu, memasangkannya dengan peralatan elektrik dan perabot. Oleh itu, jumlah yang dibelanjakan ialah RM249,299.48. P mendakwa D1 dan D2 telah melakukan penipuan dan pecah amanah menyebabkan dia dilucutkan separuh hartanah yang tidak dipecahkan. Defendan menegaskan bahawa: (i) hartanah
F itu dibeli dan didaftarkan atas nama D2 pada tahun 2009 atas kehendak mendiang bapa mereka; (ii) walaupun pinjaman telah diambil di bawah nama D2, ia telah dibayar oleh D1 dan mendiang bapanya; dan (iii) hartanah itu akan dipindah milik kepada nama tunggal D1 yang kemudiannya menjelaskan pinjaman yang diambil di bawah nama D2. D1 menegaskan bahawa selepas
G kematian bapa mereka dan selepas D1 dan P berkahwin secara sah, P mendapat tahu bahawa dia dan ibunya telah mewarisi sejumlah wang ('wang yang diwarisi'). Apabila D1 jatuh sakit, P telah membiarkan dia di bawah pengaruh dadah psikotropik menyebabkan dia berasa mamai, meyakinkannya bahawa dia dirasuk dan dipukau oleh ilmu hitam, dan P mengambil peluang untuk
H memindahkan wang yang diwarisi itu ke akaunnya sendiri tanpa pengetahuannya atau persetujuannya. P kemudian menggunakan sebahagian daripada wang yang diwarisi untuk menebus hartanah tersebut. Pada masa material dia tidak pernah bersetuju untuk hartanah itu menjadi harta sepencarian kerana ia adalah harta keluarga defendan. D1 hanya pulih semula
I kesihatan mentalnya selepas dia 'diselamatkan' oleh ahli keluarganya dengan membawanya pergi daripada tinggal bersama P, dan selepas dia menghentikan pengambilan ubat psikotropik yang diberi oleh isterinya sebelum ini. Defendan menuntut balas terhadap P untuk, antara lain: (A) pengisytiharan bahawa hartanah itu bukan harta sepencarian; (B) P untuk keluar dari

hartanah itu; (C) P untuk memulangkan wang; (D) ganti rugi am untuk pecah amanah, penipuan, pemalsuan atau tort penukaran; dan (E) ganti rugi teruk dan teladan.

Diputuskan, menolak tuntutan:

(1) P telah membeli cek bank daripada wang yang dia telah pindahkan kepada dirinya daripada akaun D1 dan akaun ibu D1. Wang yang digunakan untuk melaksanakan pembayaran jumlah penebusan bukanlah wang P sendiri. D1 dan ibunyalah yang menjadi penyedia dana ini. Oleh itu, dakwaan P berdasarkan doktrin anggapan untuk mempunyai amanah yang terhasil untuk memihak kepadanya terhadap nilai jumlah penebusan yang dibuat olehnya, adalah tanpa merit (lihat perenggan 41 & 50).

(2) Penegasan oleh D1 bahawa wangnya telah dipindahkan daripada akaunnya dan akaun bersamanya dengan ibunya semasa tempoh dia berada di bawah pengaruh dadah psikotropik yang ditadbir oleh P adalah boleh dipercayai. Dan ketika di bawah pengaruh sedemikian, dia tidak berada dalam kedudukan untuk memberikan persetujuan yang diketahui. Dalam keadaan itu, D1 tidak secara sukarela memberikan wang yang telah dipindahkan oleh P kepada tiga akaun peribadi di bawah nama tunggalnya dan oleh sebab itu, D1 juga telah cukup menyangkal anggapan pendahuluan (lihat perenggan 69–70).

(3) Mengenai fakta bahawa adalah didapati dan khususnya bahawa jumlah penebusan yang dibayar oleh P adalah sebenarnya wang D1, ia berikutan pergantungan P pada konsep amanah konstruktif untuk menuntut bahagian dalam hartanah itu adalah tanpa merit. Dengan P telah gagal dalam tuntutannya untuk bahagian dalam hartanah itu, secara logiknya D2 boleh berpendirian bahawa dia sebagai pemilik berdaftar hartanah itu untuk mendapatkan milikan kosong hartanah itu dan bahawa tiada inferens bertentangan akan dibuat terhadapnya kerana tidak tampil sebagai saksi. Penegasan oleh P untuk mahkamah membuat inferens bertentangan terhadap D2 berdasarkan s 114(g) Akta Keterangan 1950 adalah salah dan tanpa merit. Tuntutan P berdasarkan penipuan dan pecah amanah juga tidak dibuktikan dan sewajarnya ditolak (lihat perenggan 73, 75 & 77–78).

(4) D1 telah membuktikan atas imbangan kebarangkalian bahawa P telah menukarkan kepada dirinya sendiri wang D1 yang dipegang olehnya dan yang disimpan bersama ibunya, dan oleh itu sebagai pemegang akaun bersama dia berhak kepada akaun daripada P wang yang dia telah secara salah dan tort menukar kepada dirinya sendiri. Selanjutnya, D1 telah secara cukup menyangkal bahawa wang yang dipindahkan kepada nama tunggal P adalah bertujuan untuk diberikan kepadanya dan oleh itu amanah yang terhasil wang ini wujud dengan P perlu mengakaunkan

kepada D1 untuk perkara yang sama. Walau bagaimanapun, wang D1 yang dibelanjakan olehnya untuk faedah tujuan sedemikian akan menarik penggunaan doktrin anggapan (lihat perenggan 79–81).]

Cases referred to

Carl-Zeiss-Stiftung v Herbert Smith & Co (a firm) (No 2) [1969] 2 Ch 276, CA (folld)

Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor [1997] 3 MLJ 693; [1997] 4 CLJ 509, SC (distd)

Loo Cheng Suan Sabrina v Khoo Oon Jin Eugene [1995] 1 MLJ 115, HC (refd)

Neo Tai Kim v Foo Stie Wah [1982] 1 MLJ 170, CA (refd)

Ng Li Lin (P) v Ting Tian Hwa [2017] 10 MLJ 626; [2017] 4 CLJ 522, HC (refd)

Paragon Finance plc v D B Thakerar & Co (a firm); Paragon Finance plc and another v Thimbleby & Co (a firm) [1999] 1 All ER 400, CA (folld)

Sang Lee Co Sdn Bhd v Subramaniam a/l Mayawan & Ors [2011] 5 MLJ 374; [2011] 1 CLJ 167, CA (distd)

Sinar Wang Sdn Bhd v Ng Kee Seng [2005] 2 MLJ 42; [2004] 3 CLJ 679, CA (refd)

Takako Sakao (f) v Ng Pek Yuen (f) & Anor [2009] 6 MLJ 751; [2010] 1 CLJ 381, FC (distd)

Legislation referred to

Evidence Act 1950 ss 103, 114(g), 134
Rules of Court 2012 O 40A r 3

Lau Chee Foon (Lau Partnership) for the plaintiff.
Andrew Soong Tze Toong (with Siti Aishah bt Mohamed Azahari) (BH Koh, Soong, Zarin & Partners) for the defendant.

Su Tiang Joo JC:

INTRODUCTION

[1] Lord Byron in his epic satirical poem 'Don Juan' in expressing the strangeness of truth said:

> Tis strange — but true, for truth is always strange, Stranger than fiction: if it could be told.

[2] This court was tasked to decide from the evidence led whether the money paid by the plaintiff wife to redeem the charge over the property claimed to be matrimonial property, to which she claimed a half undivided share, was in fact money siphoned by her from the bank accounts of her

defendant husband who alleged he was fed psychotropic drugs by her and induced into thinking he had been charmed by black magic and becoming possessed, leading him to be unaware of what he was doing.

[3] After five days of trial, this court had on 19 May 2023 found substantially in favour of the husband. Dissatisfied, the wife had on 16 June 2023 appealed, and these are the grounds of judgement.

THE PARTIES

[4] The plaintiff ('P') is the lawful wife of the first defendant ('D1').

[5] The second defendant ('D2') is the sister of D1.

[6] D2 is, therefore, the sister-in-law of the plaintiff. Both D1 and D2 shall be collectively referred to as the defendants.

BROAD OVERVIEW

[7] On or about 2009, D1 purchased the property held under issue of document PN 336216, Lot 3759504, Mukim Hulu Kinta, Daerah Kinta Negeri Perak with a house erected thereon ('the said property') for RM238,000.

[8] Although the said property was purchased by D1, it was caused to be registered under the name of D2.

[9] On or about 24 October 2019, the said property was transferred into the sole name of D1. And, on 13 August 2020 the said property was [re]transferred into the sole name of D2.

[10] P commenced this action as D1 was making demands for her to vacate the said property which she is occupying with their children.

[11] Both P and D1 were lawfully married on Valentine's Day, 14 February 2017. From their intimate relationship entered into before they were lawfully married, they are blessed with two children. The names of the parties are not set out in full with the view to protect their privacy, in particular, their children who are still minors.

[12] P asserts that the said property is a matrimonial home, acquired during the marriage of she and D1. That she has contributed towards the payment of the loan taken to purchase the said property, purchased a bank draft and paid

A the redemption sum of RM154,757.84, expended a sum of RM94,541.64 towards the conveyancing legal fees, painting and renovation works of the said property, fitting it out with electrical appliances and furniture. Thus, the total amount spent came to RM249,299.48.

B **[13]** In summary, P claimed that D1 and D2 had committed fraud and breach of trust causing her to be deprived of half undivided share in the said property, and she sued for:

(a) a declaration that she is beneficially entitled to half undivided share of
C the said property;

(b) that D2 holds the said property on trust for both her and D1 in equal shares;

(c) that the said property be transferred into the names of she and D1;
D

(d) an injunction to prevent D2, her servants, employees, agents or otherwise from dealing with the said property;

(e) that she and their children be allowed to occupy the said property until the disposal of the action or such order as may be made by this
E honourable court;

(f) they bear all incidental costs and fees to effect the conveyance of the said property;

(g) general damages for breach of trust, cheating and/or fraud to be assessed;
F

(h) alternatively, a sum of RM249,299.48 be refunded to her by way of special damages;

(i) interest at 5%pa on the judgment sum from the date of the issuance of the writ (12 November 2020) and costs; and
G

(j) such further or other relief as may be deemed fit by this honourable court.

[14] Although they entered into an intimate relationship much earlier, D1
H explained that his marriage with P was lawfully registered only upon the demise of his father who together with members of his family had disapproved of P.

[15] The defendants asserted that:

I (a) the said property was purchased and registered in the name of D2 in 2009 upon the wishes of their late father;

(b) although a loan was taken under the name of D2 from Lembaga Pembiaya Perumahan Sektor Awam, it was serviced by both D1 and his late father; and

(c) following discussions amongst their family members, it was agreed for the said property to be transferred into the sole name of D1 who then settled the loan taken under the name of D2.

[16] D1 asserted that upon the death of their father, and after D1 and P were lawfully married:

(a) P came to know that he and his mother have inherited a substantial sum of money ('inherited money');

(b) when D1 fell ill, P had kept him under the influence of psychotropic drugs making him feel dopey, convinced him that he was possessed and charmed by black magic, and P took the opportunity to transfer the inherited money to her own account without his knowledge or his consent;

(c) P then used [part] of the inherited money to redeem the said property;

(d) at no material time did he ever agree for the said property to be a matrimonial property because it is the property of the defendants' family;

(e) P had taken his two Rolex watches and his Toyota Hilux car; and

(f) he asserted he only regained his mental health after he was 'rescued' by his family members by taking him away from staying with P, and after he discontinued the taking the psychotropic drugs fed him by his wife earlier.

[17] In summary, the defendants counterclaimed against P for:

(a) a declaration that the said property is not a matrimonial property of P and D1;

(b) an order for the removal of the private caveat lodged by P over the said property;

(c) P to move out of said property;

(d) P to return the money in savings and fixed deposit accounts amounting to RM1,135,138.90;

(e) P to return D1's two Rolex watches with serial numbers A9R56702 and 0890R359;

(f) for P to return D1 his car, a Toyota Hilux with registration number AGC 3889 in good condition;

(g) general damages for breach of trust, cheating, fraud or tort of conversion;

(h) aggravated and exemplary damages;

(i) interest and costs; and

(j) such further or other relief as this honourable court may deem fit.

ISSUES FOR DETERMINATION

[18] P formulated the following issues for determination by this court:

(a) whether there is a constructive or resulting trust where D1 and/or D2 are to hold half share of the said property for P's benefit; and

(b) whether by the acts of D1 and or D2 individually or jointly they have perpetrated a breach of trust, fraud, cheating, unjust enrichment or the tort of conversion against P.

[19] On their part, the defendants formulated the following issues:

(a) whether the withdrawal of the monies from the various accounts of D1 by P was done without the consent of D1 due to the influence of the psychotic (sic) drugs;

(b) whether P's act of withdrawing the monies when D1 who was under the influence of psychotic (sic) drugs made P's conduct unconscionable;

(c) whether the monies withdrawn was used for payment of living and medical costs of D1;

(d) whether the principle of presumption of advancement apply in respect of the monies withdrawn by P; and

(e) whether P had unjustly enriched herself and all monies now held by her shall now be subjected to a constructive trust to be held in favour of D1.

[20] After perusing the pleadings, having conducted the trial over five days from the 9–13 January 2023, and having perused the written submissions filed, in my considered view, the issues formulated by the parties can be distilled into the following core issues:

(a) whether the money utilised by P to redeem the loan owing and to upkeep the said property belongs to P or to D1 and whether P has a share in the said property; and

(b) if the money belongs to D1, does the presumption of advancement apply and if not, is P to account for the money.

THE COURT'S ANALYSIS AND FINDINGS

Whether the money utilised by P to redeem the loan owing and to upkeep the value of the said property belongs to P or to D1 and whether P has a share in the said property

Not a case of apportionment of matrimonial assets

[21] On 19 May 2023, this court sat for purposes of clarification of the written submissions presented as well as for decision.

[22] To a question posed by me, Ms Lau Chee Foon who is the learned counsel for P, and Mr Andrew Soong Tze Toon who is the learned counsel for the defendants, confirmed that this action is not one involving a matrimonial dispute where the court is tasked to apportion matrimonial assets.

[23] However, I was informed by Ms Lau that there are separate proceedings on foot for the custody of their minor children.

[24] During the trial, three witnesses including P were produced to support P's claim and four witnesses including D1 were produced by the defendants. I was informed that by reason of D2 being in Sabah and so as not to unnecessarily prolong the trial, she will not be called.

[25] Evidence was led by P to show that her first child with D1 was in 2008 and their second child in 2012. The said property was acquired in 2009 under the name of D2.

Said property not matrimonial home

[26] Under cross-examination (NP p 23 line 561), P agreed that at the time of the purchase of the said property (in 2009), she did not have any knowledge of it as she had broken off her relationship with D1.

[27] Under re-examination (NP pp 51–52 line 1243 to 1255) P said she came to know of the purchase from D2 in 2014. And, in P's [amended] statement of claim (bundle A in p 24 para 16) it was towards the end of 2018, ie *about nine years after the said property was purchased,* that P proposed to move to the said property.

[28] This would support D1's assertion that the said property was not purchased with the intention of making it a matrimonial home for P and D1

A and instead, it was a piece of property purchased by D1's father together with D2 and D1, with contributions made by D1.

[29] However, P pleaded (see bundle A para 18) that when she wanted to move to reside in the said property in 2018 together with their children, it was B proposed that the said property be transferred by D2 to D1 and to make it their matrimonial home, and by reason of this P had agreed to come up with the money to settle the balance of the outstanding loan.

C Contribution towards the outstanding loan and upkeep of the said property

[30] P (PW1) led documentary evidence (exh P3, Bundle E pp 216–218) to show that she had purchased a Maybank banker's cheque for RM 154,757.84 on *28 September 2018* to redeem the loan taken by D2 to settle the outstanding D loan owing for the said property.

[31] P also led evidence to show that she had issued a cheque for RM9,300 from her Affin Bank Bhd account on *15 October 2019* to pay for the legal fees to have the said property conveyed from D2 to D1.

E

[32] Evidence was also led by P (Bundle E pp 219–248) to show that she had paid for the purchase of electrical appliances and furniture over a period of time from *8 June 2018 to 28 October 2020* amounting to a total of RM66,936.64 to fit out the said property. This she asserted was done to make it into a home for F their family comprising she, D1, and their children when she relocated from Pahang to Perak.

[33] The above three payments come to RM249,299.48. That these G payments were made was not challenged by the defendants.

Money trail

[34] However, during cross-examination, PW1 was taken through the H banking documents in the Common Agreed Bundle of Part B Documents (Bundle D) and it was put to her that the payments made by her were from money belonging to D1 which were inherited by D1 when his father died and from money in the joint account of both D1 and his mother and from his personal accounts, all of which, belong to D1. She disagreed.

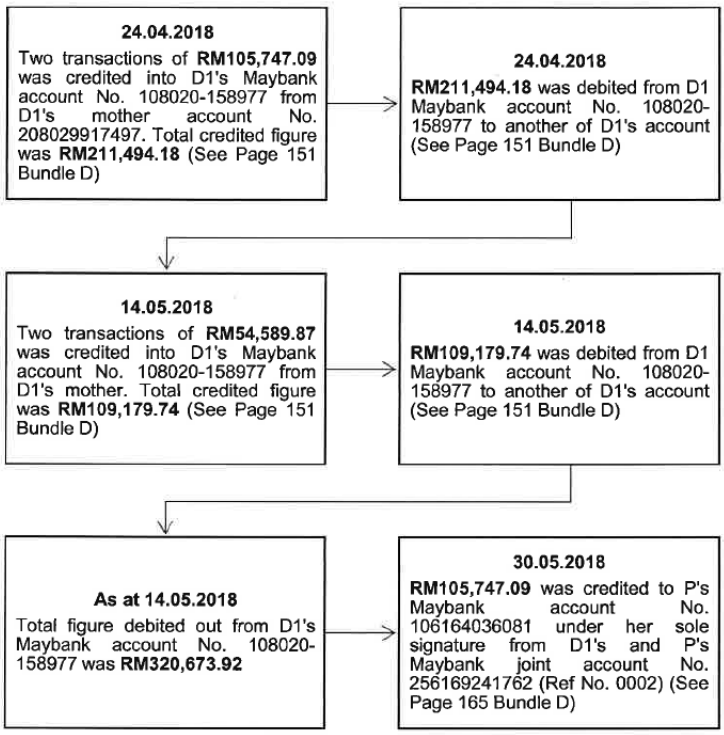
I

[35] To analyse the banking documents with the view to follow the money trail, I had directed for further written submissions to be filed.

[36] Learned counsel for P filed hers (encl 78) which took the form of a chronology of events instead of the movement of money, and which, with respect, was not helpful.

[37] However, learned counsel for the defendants helpfully produced a flow chart in his written submissions (encl 77). This chart is reproduced hereunder with editions made describing the parties as P, D1 and D1's mother instead of their names in full, and to identify P's MBSB account:

FLOW CHART 1 - Movement of Monies in respect of the Redemption Sum from Maybank Berhad


24.04.2018
Two transactions of RM105,747.09 was credited into D1's Maybank account No. 108020-158977 from D1's mother account No. 208029917497. Total credited figure was RM211,494.18 (See Page 151 Bundle D)
24.04.2018
RM211,494.18 was debited from D1 Maybank account No. 108020-158977 to another of D1's account (See Page 151 Bundle D)
14.05.2018
Two transactions of RM54,589.87 was credited into D1's Maybank account No. 108020-158977 from D1's mother. Total credited figure was RM109,179.74 (See Page 151 Bundle D)
14.05.2018
RM109,179.74 was debited from D1 Maybank account No. 108020-158977 to another of D1's account (See Page 151 Bundle D)
As at 14.05.2018
Total figure debited out from D1's Maybank account No. 108020-158977 was RM320,673.92
30.05.2018
RM105,747.09 was credited to P's Maybank account No. 106164036081 under her sole signature from D1's and P's Maybank joint account No. 256169241762 (Ref No. 0002) (See Page 165 Bundle D)

A

FLOW CHART 1 - Movement of Monies in respect of the Redemption Sum from Maybank Berhad

B

C

D

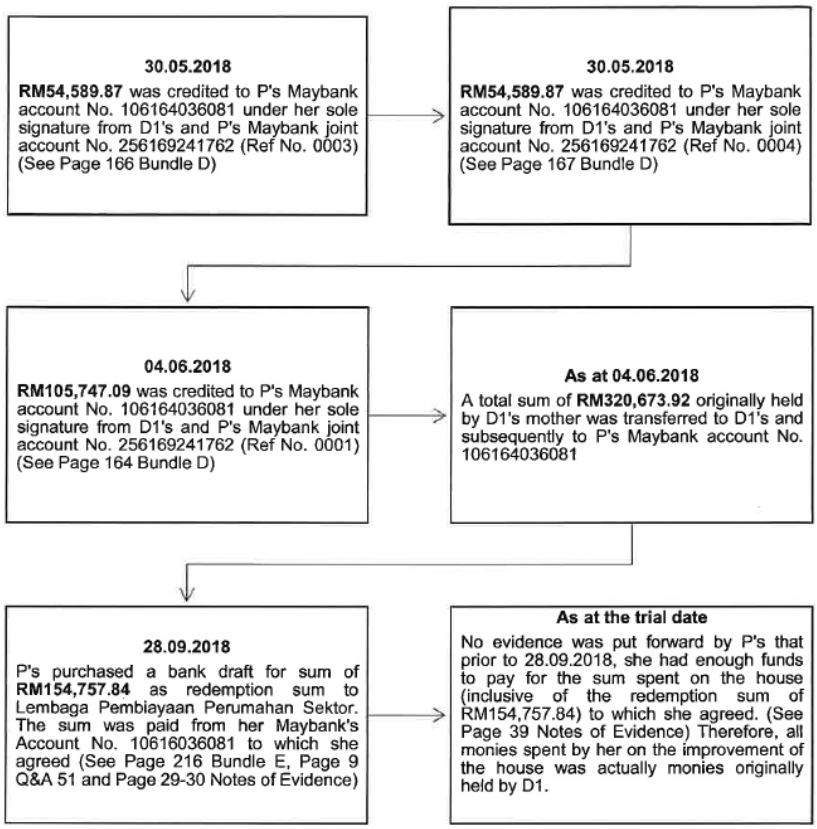
E

F

G

H

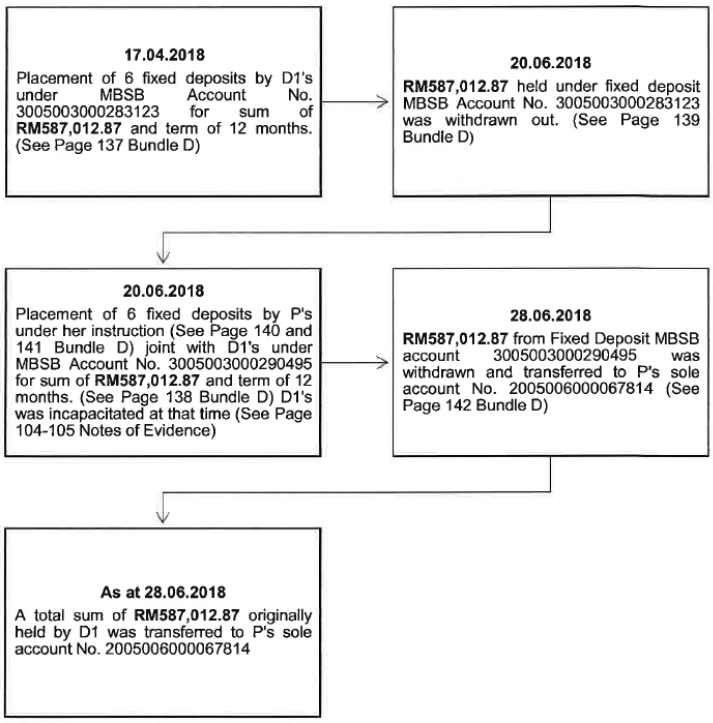
I


30.05.2018
RM54,589.87 was credited to P's Maybank account No. 106164036081 under her sole signature from D1's and P's Maybank joint account No. 256169241762 (Ref No. 0003) (See Page 166 Bundle D)
30.05.2018
RM54,589.87 was credited to P's Maybank account No. 106164036081 under her sole signature from D1's and P's Maybank joint account No. 256169241762 (Ref No. 0004) (See Page 167 Bundle D)
04.06.2018
RM105,747.09 was credited to P's Maybank account No. 106164036081 under her sole signature from D1's and P's Maybank joint account No. 256169241762 (Ref No. 0001) (See Page 164 Bundle D)
As at 04.06.2018
A total sum of RM320,673.92 originally held by D1's mother was transferred to D1's and subsequently to P's Maybank account No. 106164036081
28.09.2018
P's purchased a bank draft for sum of RM154,757.84 as redemption sum to Lembaga Pembiayaan Perumahan Sektor. The sum was paid from her Maybank's Account No. 10616036081 to which she agreed (See Page 216 Bundle E, Page 9 Q&A 51 and Page 29-30 Notes of Evidence)
As at the trial date
No evidence was put forward by P's that prior to 28.09.2018, she had enough funds to pay for the sum spent on the house (inclusive of the redemption sum of RM154,757.84) to which she agreed. (See Page 39 Notes of Evidence) Therefore, all monies spent by her on the improvement of the house was actually monies originally held by D1.

A

FLOW CHART 2 - Movement of Monies in respect of the Fixed Deposit in MBSB

B


17.04.2018
Placement of 6 fixed deposits by D1's under MBSB Account No. 3005003000283123 for sum of RM587,012.87 and term of 12 months. (See Page 137 Bundle D)
20.06.2018
RM587,012.87 held under fixed deposit MBSB Account No. 3005003000283123 was withdrawn out. (See Page 139 Bundle D)
20.06.2018
Placement of 6 fixed deposits by P's under her instruction (See Page 140 and 141 Bundle D) joint with D1's under MBSB Account No. 3005003000290495 for sum of RM587,012.87 and term of 12 months. (See Page 138 Bundle D) D1's was incapacitated at that time (See Page 104-105 Notes of Evidence)
28.06.2018
RM587,012.87 from Fixed Deposit MBSB account 3005003000290495 was withdrawn and transferred to P's sole account No. 2005006000067814 (See Page 142 Bundle D)
As at 28.06.2018
A total sum of RM587,012.87 originally held by D1 was transferred to P's sole account No. 2005006000067814

C

D

E

F

G

H

I

[38] From the flow chart with cross references made to the documentary evidence in the Common Bundle of Documents (encl 38 marked as Bundle D) which were all Part B documents, that is, documents agreed as to authenticity save as to contents, the defendants have accurately summarised that:

(a) P had on *30 May 2018* transferred a sum of *RM54,589.87* from the Maybank account under the joint names of D1 and her, to her Maybank Account No xxxx1762 held under her sole name;

(b) P had on *4 June 2018* transferred a [further] sum of *RM105,747.09* from the Maybank account under the joint names of D1 to her Maybank Account No xxxx1762 held under her sole name;

(c) on *4 June 2018* a total sum of *RM320,673.92* held in the bank account of D1's mother was transferred into the Maybank account of D1 and subsequently transferred into P's Maybank Account No xxxx6081 held under her sole name;

(d) P had on *28 September 2018* purchased a Maybank banker's cheque (exh P3) for *RM154,757.84* in favour of Lembaga Pembiayaan Perumahan Sektor and this sum was debited from her Maybank Account No xxxx6081 under her sole name;

(e) P had on *20 June 2018* uplifted six fixed deposits and withdrawn a total sum of *RM587,012.87* from D1's account under D1's sole name and placed this sum into a joint account under the names of D1 and her; and

(f) P had later on *28 June 2018* transferred the aforesaid sum of *RM587,012.87* into her MBSB account No xxxx7814 under her sole name.

[39] The sum total is that between 30 May 2018 to 28 June 2018, P had transferred a total sum of *RM1,068,023.75* from accounts standing to the credit of D1 and his mother, to three accounts each held under her sole name.

[40] At the time of P giving her testimony on 9 January 2023, she testified that she is a housewife. Although she had pleaded (bundle A para 13) that she was working in Pahang when her marriage to D1 was registered on 14 February 2017, no evidence was led on her means to support her assertion that the redemption sum came from her own money. Instead, D1 asserted since their marriage, P became a fulltime housewife.

[41] From the aforesaid evidence led and analysed on the money trail, the irresistible inference to be drawn is that P had purchased the Maybank banker's cheque from the money she had transferred to herself from the accounts of D1 and that of D1's mother.

[42] However, P asserted D1 fell ill and a large sum had to be used to pay for the medical expenses of D1 who required psychiatry treatment, treatments at hospitals, purchase of supplements, physiotherapy sessions and acupuncture treatment. She asserted that D1's credit cards were also used to effect payments for medical expenses and costs of living and the money that were transferred were used to fund the same (see bundle A p 112 paras 34(e), (f) and (g)).

[43] During the cross-examination of D1 (DW4), it was put to him that the transfers of money to P were all done voluntarily and in any event, by reason of their husband and wife relationship, the doctrine of presumption of advancement applies to negative any resulting trust of the money in favour of D1. This will be discussed in detail hereunder.

Doctrine of presumption

[44] Where the provider of funds are in a close familial relationship such as father and child or husband and wife, the doctrine of presumption of advancement comes into play to negative any resulting trust in favour of the provider but this is a rebuttable presumption, see *Loo Cheng Suan Sabrina v Khoo Oon Jin Eugene* [1995] 1 MLJ 115 (HC) and *Neo Tai Kim v Foo Stie Wah* [1982] 1 MLJ 170 (SGCA).

[45] Vincent Ng J (as he then was) in *Loo Cheng Suan Sabrina* described how the doctrine applies as follows:

> The Singapore case of *Chua Cheow Tien v Chua Geok Eng & Anor* [1968] 2 MLJ 180 which followed the English cases of *Shapherd v Cartwright* [1955] AC 431; [1954] 3 All ER 649; [1954] 3 WLR 967 and *Warren v Gurney* [1944] 2 All ER 472, Chua J had, quite appropriately, restated the settled law on the presumption of advancement with this illustration: *if A buys property in the name of B, who is no relative, B is held to be trustee of that property for A, but if B is a child or a wife of A, no trust is presumed, and the law presumes that the legal and beneficial ownership is in the child or the wife so that the onus is on those who seek to rebut the presumption and establish an absolute trust for the father or husband.*

[46] Reliance was placed by learned counsel for P on the case of *Ng Li Lin (P) v Ting Tian Hwa* [2017] 10 MLJ 626; [2017] 4 CLJ 522 (HC) where Vazeer Alam Mydin Meera J (now JCA) had occasion to say at para [43] as follows:

> [43] In law, the presumption of advancement arises because of the relationship of the parties, and when such presumption arises it would negate any presumption of a resulting trust. This means that a resulting trust would not arise if the person receiving were the giver's wife or child or someone to whom the giver stands in *loco parentis*. However, the presumption of advancement can be rebutted if the party claiming otherwise can show that at the time of the transaction there was between

say the husband (giver) and the wife (receiver) a common intention that it was to be otherwise.

[44] *The onus to show this would be on the giver.* See *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751; [2010] 1 CLJ 381 (FC); and *Heng Gek Kiau v Goh Koon Suan* [2007] 6 CLJ 626 (CA); *Dato' Kadar Shah Tun Sulaiman v Datin Fauziah Haron* [2009] 8 MLJ 510; [2009] 10 CLJ 95 (HC).

[47] P pressed into her aid the doctrine of presumption of advancement for the redemption sum paid by her, the monies expended by her, the two Rolex watches and the Toyota Hilux.

[48] As it is undisputed that P and D1 are husband and wife, it thus lay upon D1 to rebut this rebuttable presumption of advancement.

[49] Although the burden is upon D1 to lead evidence to rebut this presumption, it would be opportune to set out here, that P had relied upon several photographs taken for the *period from 2017 until the end of December 2019* (Bundle D pp 190, 193–195, 198 and 202) to assert that her [matrimonial] relationship with D1 during this period was a close and happy one. I observed that this period coincides with the period in which the monies were withdrawn from D1's accounts and the joint account of D1 and his mother.

[50] However, the money utilised to effect payment of the redemption sum *was not P's own money* as asserted by her. Instead, from my analysis of the money trail, the money used was D1's money as well as the money of D1 and his mother. In short, it was D1 and his mother who were the provider of these funds. Therefore, P's claim grounded on the doctrine of presumption to have a *resulting trust* in her favour to the value of the redemption sum made by her, is without merit.

Were the transfers of money, the two Rolex watches and the Toyota Hilux advanced/given to P with the consent of D1

[51] D1 pleaded (bundle A paras 28–43, in particular para 43) and led evidence telling what at first blush, is a seemingly bizarre tale.

[52] He gave evidence to the effect that during the period from the end of 2017 until early 2019 ('the said period') which coincided with the period of the transfers of money by P to her sole account, he was under the influence of psychotropic medication.

[53] P asserted that during the said period, D1 was suffering from dissociative disorder. Reliance was placed by P on a medical report (Bundle E pp 278–282) by one Dr Phang Cheng Kar said to be a Consultant Psychiatrist from Sunway Medical Centre. This Dr Phang was not called as a witness and his report was not admitted as an exhibit.

[54] Evidence was led by D1 from Prof Dr Esther Ebenezer (DW1) a Consultant Psychiatrist and Old Age Psychiatrist, who affirmed an affidavit (encl 45 marked as exh G2 NP p 85 line 2085) enclosing her medical report on D1. This affidavit is prepared and filed pursuant to O 40A r 3 of the Rules of Court 2012 with DW1 affirming that she understands that in preparing her report her primary duty is to the court.

[55] From her curricular vitae which sets out, inter alia, her experience as a Psychiatric Medical Officer since November 1993, this court had no hesitation in accepting her as an expert in the field of psychiatry.

[56] During her testimony (NP p 78), she described 'dissociative disorder' as follows:

> Actually, dissociative disorder is not a common condition, but it can happen if a person was under very serious stress, not like normal day to day stress, it is overwhelming stress, like a being [in] combat or maybe witnessed a big murder or was a party to [an] accident, or a survivor of a major disaster ... the person can develop dissociative disorder where they can lose their identity, they can't remember who they are, or they totally forget the event [of] that disaster they witnessed or that they were part of the disaster, they totally forget the whole event.
>
> And they lose, total memory loss of that event or maybe something very painful of that particular event, they can forget. So, these things happen, all surface in a sudden situation where they forget about them, so they feel they are not well and the world around them is not clear ... they feel they are not in a real world. It's always after a major stress, not normal day to day stress — like getting bad reports from your boss, failing an exam, some relationship problems, these are normal things. That person shouldn't develop dissociative disorder, which is not a common condition.

[57] From her review of Dr Phang's report, she said that there is no mention of any major overwhelming stress that D1 had suffered as to make him behave like a person with dissociative disorder and by reason of which, D1 ought not have been diagnosed with such a disorder.

[58] What is pertinent is that DW1 opined that the main treatment for dissociative disorder is psychotherapy which is talking therapy. The therapist will dig out information from the patient. Hypnosis may be used. The talking therapy is the main mode of treatment to help the patient to deal with the

problem. She said:

> *Normally we don't give medication* for this type of dissociative disorder, unless the person became depressed because of certain situations, maybe witnessed an accident, he's part of the accident, faced a good friend passing away during the accident, because of a very terrible event causing him not to be able to take it anymore. So, if he is so much depressed because of the event that he couldn't take it anymore then ... an antidepressant has a role. If not, it is mostly giving psychotherapy that is talk therapy and helping to deal with the situation that the person went through.

[59] DW1 went on to testify (NP p 82 line 1994) that psychotropic medication such as Mirazapine, is given to [psychotic] people who are mentally unstable, for example schizophrenia patients whom in Malay are called 'gila', who talks nonsense, are out of reality, experiencing hallucinations, delusions and are paranoid. The anti-psychotic medication is given so as to reduce the level of dopamine and when the level of dopamine comes down, they will become like a normal person. And, when the medication is given, the person will become very dopey, docile, don't know what they are doing, lose alertness, memory will be affected, emotion will become blunt ie they don't show any emotion like happiness (NP p 83 line 2042) sleepy, very slow. It can affect the commission in memory, and even physically. With the aid of Google, I found that 'commission in memory' means there is a form of memory present, but it is not of the desired fidelity or the desired fact, event or ideas (*Schacter's Seven Memory Distortions* by Dr Daniel Schacter, https://study.com/academy/lesson/schacter-sseven-memory-distortions).

[60] When DW1 was consulted by D1 on 1 June 2021, her assessment (NP p 84) was that D1 was:

> a totally normal person, there was nothing wrong with him. He came to me for a second opinion after going to Hospital Ipoh, where they also diagnosed him as being normal ... [but] because that diagnosis was done by a Medical Officer (on 14 July 2020) ... he was not sure whether the Medical Officer has enough experience to tell that he is normal, but then he came to me, I examined him and he was also normal.

[61] The cross-examination by learned counsel for P challenged the assessments and that of the Medical Officer of Hospital Ipoh as having been done only in July 2020 and June 2021 respectively. It was put to DW1 that she had not met Dr Phang Cheng Kar and it was confirmed that DW1 has no knowledge whether any complaints were made against Dr Phang for him having diagnosed D1 with suffering from dissociative disorder and prescribing him with psychotropic drugs.

[62] D1 (DW4) who qualified with a law degree before joining the police force, gave his evidence in chief by way of a witness statement (PSD4) containing 114 paragraphs and he was subjected to lengthy cross-examination during his oral testimony (NP pp 151–219) which in summary say:

(a) although still married to P, he is estranged from P since three years ago (2020);

(b) P had convinced him that he was suffering from psychological or dissociative disorders whereby he was informed by P that he had on various occasions in the night burnt his clothes, smashed framed photographs, was possessed having been charmed by black magic (PSD4 para 21) with him not being able to recollect whether and what he has done;

(c) that when he was hospitalised, P convinced Dr Phang that he (D1) was having mental problems resulting in him being diagnosed with suffering from dissociative disorder and prescribed psychotropic drugs such as :

(i) T Mirazapine (Remeron) 15mg;

(ii) ON & T Lorazepaam 1mg ON/PRN;

(iii) T Olanzapine (Tolanz) 5–10mg;

(iv) T Clonazepam (up to 2mg BD); and

(v) T Quetiapine 200–400mg.

(d) P purchased the psychotropic drugs above and fed him with them since 18 January 2018;

(e) P took him to various temples to pray to get rid of demons said to be plaguing him (PSD4 para 27);

(f) he was given food separate from his children and not allowed to procure his own food;

(g) on the occasion that he was to receive an award from the Pahang House of Royalty, he was not fed the psychotropic drugs a few days before then, simply because he was informed by P that the palace is a holy place free from black forces and on the day of the award ceremony, he felt fresh, with P convincing him that what she said was true (PSD4 para 30). This explains why he looks fine in the photographs (Bundle D pp 190 to 192). However, after that, when he was again fed the psychotropic drugs, his health deteriorated;

(h) P also persuaded his mother to be referred to Dr Phang since February 2018 with P saying that D1's mother was having the same symptoms as D1, prescribed psychotropic drugs and moved into an Old Folks home;

(i) he came under the control and influence of P who managed all his activities, and he would agree to all her wishes;

(j) his request to P for the return of his bank and identity cards in July 2018 was refused;

(k) only on an occasion when P was not around that he was able with the assistance of a friend to go with his mother to the bank only to find that all his and his mother's money have been transferred out to P's account;

(l) when he raised this issue, P ignored him and he was scolded by P's father (PW3) who said the money is P's and his because they are looking after them (D1 and mother);

(m) once after he and P had a row, P assured him that she will return all his money once he recovers;

(n) he was not allowed to meet his friends;

(o) upon P's suggestion, they went to Chiang Mai, Thailand to pray to get rid of the alleged evil disturbances and during this time, the dosage of psychotropic drugs was reduced and he felt better as can be seen in the photographs (Bundle D p 194);

(p) he was unduly influenced by P whilst in his weakened state to have [all] his inherited money, his other money and that held under joint account transferred to P's account;

(q) P had taken advantage of his poor state of health to use his ATM bank cards to transfer monies from his Maybank account for the period from 28 November 2017 and 29 November 2019;

(r) when rows between them arise over the money, P lodged a police report against him alleging domestic violence against her and the children despite him having no memory at all about such an event as to cause him to be most worried about his career;

(s) P then said that she will withdraw the police report if he transfers half undivided share in the said property to her, a conversation which was said to be overheard by D2 and who told D1 not to be blackmailed;

(t) several other similar incidents were graphically detailed with he saying that after he managed to get away with the aid of his family members from staying with P and becoming estranged from P, and stopping the taking of the psychotropic drugs which were not needed at all, he has recovered save for a burn to a cornea in one of his eyes which he attributed to the psychotropic drugs administered to him;

(u) in summary, he was the victim of P's mala fide and devious actions, he is remorseful of ignoring his father's and his family's objections to him

marrying P resulting in his mother almost dying, all his money stolen and to this date yet to have a home to stay with his mother; and

(v) fearful that he will be cheated by P, he had the said property transferred to D2.

[63] P denies the assertions of D1 that he does not suffer from dissociative disorder. P also deny that his state of poor mental health was brought about by her subjecting him to being fed with the psychotropic drugs.

[64] To support his assertions, D1 has called DW1 to testify as to his mental health, why such medication ought not to have been prescribed to D1 and the severe debilitating side effects such medication will bring about. He gave evidence that upon he ceasing such medication, and presenting himself to DW1, the latter had found him to be a totally normal person.

[65] Therefore, in my considered view, the evidential burden shifted to P to prove that during the said period in time when the money of D1 and D1's mother were transferred to P's accounts in her sole name, D1 was in such a psychiatric state of mind as to require being prescribed psychotropic drugs.

[66] Section 103 of the Evidence Act 1950 provides that:

> The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

[67] As P sought to rely upon Dr Phang's report (Bundle D pp 278–282) to prove that D1 was suffering from dissociative disorder, she carried the burden of producing Dr Phang. She did not. Although Dr Phang's report was referred to during the trial, it was not admitted as an exhibit, and with Dr Phang not having been produced as a witness to testify, I will give it little weight.

[68] I next evaluate the following pieces of evidence:

(a) documentary evidence of prescriptions of psychotropic drugs issued by Dr Phang (common bundle of documents marked C pp 12 to 98) — these prescriptions were from 18 January 2018 until 8 July 2019 which I observed coincided with the said period in time;

(b) that it was put to P under cross-examination (NP p 42) that P herself had gone to the pharmacy, Farmasi Rayyan, to purchase psychotropic drugs — although put, P denied and this was not proved;

(c) that it was put to P under cross-examination (NP p 42) that she had increased the dosage of psychotropic drugs administered to D1 — I

accept the detailed evidence of D1 on the two incidents, namely, the stoppage of administration of psychotropic drugs during his award ceremony and the holiday to Chieng Mai that find that P had control in the administration of drugs to him;

(d) as to whether P had sought for the benefit of D1's Hong Leong Assurance policy (Bundle G pp 525–531) favoring D1's mother to be transferred to P — although I find DW3's articulation skills to be lacking and there were difficulties during the interpretation of his testimony, I find him to be a credible witness and accept his direct evidence that on 13 October 2018 he received a telephone call from P to see her in Kuantan to discuss about an insurance policy and he went up with his wife. Upon being given P's identity card, DW3's wife had filled up the nomination form and he (DW3) was very sure that he witnessed P signing the nomination form (NP p 131 line 3208–3216). P had produced PW2 an expert document examiner and tendered his expert [opinion] in his Signature Verification Report (Bundle B pp 1 to 50) opining that the signature said to be that of P (Bundle G p 530) is not that of P. As I have accepted DW3 to be a credible witness, with respect, to PW2 who has impressive credentials, in my considered view, the direct evidence of DW3 trumps that of the opinion evidence of PW2. Although this form was not forwarded to the insurance company for processing as DW3 said that at that time he saw D1 to be somewhat 'blur' and unstable, this piece of evidence which I accepted painted P in a bad light. The logical inference is that P is controlling D1's financial affairs which in this case includes his life insurance policy at this point in time which is within the said period in time which coincides with P transferring not only D1's money but also that of D1's mother held together with D1 into her sole account;

(e) the evidence of DW2 who is an officer of MBSB where D1 and his mother had joint fixed deposit accounts (NP p 102 line 2489) who testified that in April 2018 she saw D1 coming to the bank with P to transfer the money in the joint account into his sole name and to change the instructions for authorisation from signature to that of a thumbprint saying his hand hurt and he was unable to move much. And, on the second occasion in June 2018, DW2 attended to D1 and P, with P telling her that D1 is ill and require lots of money for his medical treatment, resulting in many officers seeking verification from D1 that he indeed wanted to make such a withdrawal the effect of which will see the loss of much profit in interest earned if there is a premature withdrawal of the fixed deposits. DW2 observed that D1 was in a weak state, lifeless with his head hanging down and unable to even sit straight ('lemah sangat, nampak tidak bermaya langsung, kepala dia pun macam tunduk sahaja, tidak boleh duduk straight') — (NP pp 103 and 104 line 2535 to 2537 and 2545). Under cross-examination, she maintained this

position. DW2 did advise D1 that to uplift the fixed deposit before maturity, he will lose a lot of profit, but despite that with P next to him, it was drawn out. I accept DW2 to be a credible witness;

(f) for completeness, I have evaluated the evidence of PW3, the father of P. He testified that D1 was having an affair with another woman. That in the middle of one night in March 2020, he received a telephone call from P telling him that D1 had assaulted her and their second child. He advised her to lodge a police report immediately. This piece of evidence supports P's testimony of having been assaulted. However, his testimony does not deal with the financial affairs of P and D1; and

(g) that D1 has medical insurance sufficient for him to take care of his medical needs.

[69] Having evaluated the other pieces of evidence, I am of the considered view that the assertion by D1 that his monies were transferred from his account and that of his joint account with his mother during the said period when he was under the influence of psychotropic drugs administered by P to be credible. And that whilst under such influence, he was not in a position to give knowing consent.

[70] In the circumstances, I find that he had not voluntarily given the money which was transferred by P to the three personal accounts under her sole name and by reason of which, D1 had also sufficiently rebutted the presumption of advancement.

Constructive trust

[71] Learned counsel for P cited and relied upon the case of *Paragon Finance plc v D B Thakerar & Co (a firm); Paragon Finance plc and another v Thimbleby & Co (a firm)* [1999] 1 All ER 400 (CA) and quoted Millet LJ's decision which held that a constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of the property to assert his own beneficial interest in the property. This principle was cited with approval by our Federal Court in *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751; [2010] 1 CLJ 381.

[72] Learned counsel for P also brought to the court's attention the case of *Carl-Zeiss-Stiftung v Herbert Smith & Co (a firm) (No 2)* [1969] 2 Ch 276 where Edmund Davies LJ held that English law provides no clear and all embracing definition of constructive trust, its boundaries have been left perhaps deliberately vague so as not to restrict the court by technicalities in deciding what the justice of a particular case may demand.

[73] I am guided by the principles of constructive trust in the cases cited by learned counsel for P. However, with respect, on the facts that I have found and in particular that the redemption sum paid by P was in fact D1's money, it follows that P's reliance upon the concept of constructive trust to claim for a share in the said property is devoid of merit.

D2 not produced as a witness

[74] P asserted and sought for this court to draw an adverse inference for D2 not coming forth to testify. Reliance was placed upon the provisions of s 114(g) of the Evidence Act 1950 and the cases of *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751; [2010] 1 CLJ 381 (CA); *Sang Lee Co Sdn Bhd v Subramaniam a/l Mayawan & Ors* [2011] 5 MLJ 374; [2011] 1 CLJ 167; and *Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693; [1997] 4 CLJ 509 (SC).

[75] However, in my considered view, with P having failed in her claim for a share in the said property premised upon the concept of resulting trust, doctrine of presumption as well as that it would not be conscionable for this court to impose a constructive trust of a share of the said property in her favour, it logically follows that D2 can stand on her being the registered proprietor of the said property (Bundle C pp 113–114) to seek vacant possession of the same and that no adverse inference is to be drawn against her for [not] coming forward as a witness.

[76] The crux of P's case is that she has paid for the redemption sum, and other sums of money to upkeep it as to entitle her to a share in the said property premised upon the concept of resulting trust, and the doctrine of presumption and for this court to impose a constructive trust. However, D1 has led sufficient evidence to show on a balance of probabilities that the money said to have been expended by P is his and that jointly owned by him and his mother.

[77] Thus, with s 134 of the Evidence Act 1950 in mind that provides that no particular number of witnesses shall in any case be required for the proof of any fact, I find that the assertion by P for this court to draw an adverse inference against D2 premised upon s 114(g) of the Evidence Act 1950 to be misplaced and without merit. The cases on this evidential provision cited by P can all be easily distinguished on the facts of each of them premised upon the facts of this case which I have found and narrated above.

P's claim based upon fraud and breach of trust

[78] For similar reasons, P's claim based upon fraud and breach of trust has not been made out and is accordingly dismissed.

D1's counterclaim

[79] Based upon the evidence led which I have analysed above and the findings made, I am satisfied that D1 has proved on a balance of probabilities that P has converted to herself D1's money held by him and that held together with his mother, and therefore as a joint account holder he is entitled to an account from P of the money she had fraudulently and tortiously converted to herself.

[80] I also find that D1 has sufficiently rebutted the presumption that the money transferred to P's sole name was meant to be given to her and therefore a resulting trust of this money come into existence with P having to account to D1 for the same.

[81] However, I bear in mind that P had nevertheless maintained the said property so as to make it a home for herself and her children who are, of course, also the children of D1. Such of D1's money that were expended by her for the benefit of such a purpose would attract the application of the doctrine of presumption.

Reliefs

[82] Wherefore, P's claim is dismissed.

[83] The youngest child of both P and D1 is only 11 years old and would need a place to stay. Wherefore, sitting as a Court of Equity, where the court may mould the relief that is to be granted premised upon the particular facts of the case, see *Sinar Wang Sdn Bhd v Ng Kee Seng* [2005] 2 MLJ 42; [2004] 3 CLJ 679 (CA). I grant the following reliefs to the defendants:

(a) D1's counterclaim for an order that P is to render an account to D1 within 60 days of this order of all the monies transferred from:

(i) D1's account held in his sole name in Maybank Account No 108020–158977;

(ii) the account held jointly under the name of D1 and P in Maybank Account No 256169241762; and

(iii) MBSB joint fixed deposit Account No 3005003000290495 to the sum of RM587,012.87.

(b) in the taking of accounts, credit is to be given to P for monies expended for the well-being of the P, D1 and their children as a family including that for maintenance pursuant to any court proceedings, and upon the taking of accounts the balance of any unaccounted monies with a credit of up to 15% for any monies unaccounted for monies expended on the welfare of the family, if any, is to be refunded to D1 with interest thereon at 5% pa from the date of this order until full realisation;

(c) there is credible evidence led that monies were expended by P towards the upkeep and maintenance of the property held under PN 336216 Lot 376504 Mukim Hulu Kinta Daerah Kinta Negeri Perak ('the said property') as a home for her family and I had considered imposing a constructive trust equivalent to a portion of the value of said property ('notional value') to be held by D1 in favour of P;

(d) however, sitting as a Court of Equity, I would set off this notional value against the damages I would have awarded to D1 under prayer 71(i) and (j) of his counterclaim against P for breach of trust, fraud and the tort of conversion;

(e) a declaration that the said property is not a matrimonial asset of P and D1;

(f) an order that the private caveat lodged by P over the said property vide Presentation No 14079/2020 be removed with the defendants being at liberty to have it cancelled;

(g) that the Registrar or Land Administrator is to give effect to this order;

(h) an order restraining the defendants from seeking possession of the said property for a period until the youngest child of the P and D1 attains the age of 18 years of age; and

(i) that P is to return the Toyota Hilux to D1 within 90 days instead of 30 days with the view to allow the P to secure alternative transport.

[84] In the course of closing submissions, D1 abandoned his claim for the two Rolex watches and thus this claim was struck out.

[85] After hearing parties, I awarded costs of RM40,000 subject to allocatur to be paid by P to D1.

CONCLUSION

[86] Wherefore, I find in the negative for issue number one on whether there is a constructive or resulting trust where D1 and or D2 are to hold half share of the said property for P's benefit; and I also find in the negative on issue number

two on whether by the acts of D1 and or D2 individually or jointly they have perpetrated a breach of trust, fraud, cheating, unjust enrichment or the tort of conversion against P.

[87] I grant the reliefs and orders with costs as set out above.

Claim dismissed.

Reported by Ahmad Ismail